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CRIMINAL LAW ISSUES

BOYD v. STATE, No. 49A04-0106-CR-269, ___ N.E.2d ___ (Ind. Ct. App. Mar. 7, 2002).
NAJAM, J.

Boyd next contends that his dual convictions of criminal confinement and attempted criminal confinement violate the Indiana Constitution's prohibition against double jeopardy. Specifically, Boyd argues that since the confinement incident in this case was continuous, he could have been properly convicted of only one confinement offense. We agree.

. . . .

In support of his argument, Boyd cites to this court's opinion in Idle v. State, 587 N.E.2d 712 (Ind. Ct. App. 1992). There, Idle was convicted of two counts of criminal confinement against the same victim – each count alleging that he had violated a different subsection of Indiana Code Section 35-42-3-3. . . . We reasoned that a violation of that statute during one continuous confinement may result in only one confinement conviction, notwithstanding that the defendant engaged in two different acts, one proscribed in subsection one, and the other in subsection two. [Citation omitted.] We did not, however, foreclose the possibility that a single incident of confinement could result in two separate convictions; rather, the determinative factor is whether the confinement may be divided into two separate parts. [Citation omitted.] . . .

The State contends that Idle and Bartlett [v. State, 711 N.E.2d 497 (Ind. 1999)] have been superseded by our supreme court's decision in Richardson v. State, 717 N.E.2d 32 (Ind. 1999), ...

In Richardson our supreme court listed several cases which would be superseded by its holding. Neither Idle nor Bartlett was among those listed. In addition, the State's application of the Richardson test is overbroad. The statutory elements and actual evidence tests are designed to assist courts in determining whether two separate chargeable crimes amount to the "same offense" for double jeopardy purposes. The continuous crime doctrine does not seek to reconcile the double jeopardy implications of two distinct chargeable crimes; rather, it defines those instances where a defendant's conduct amounts only to a single chargeable crime. In doing so, the continuous crime doctrine prevents the state from charging a defendant twice for the same continuous offense.

In applying that doctrine, if we determine here that Boyd's conduct is "continuous" and therefore one crime, then there are not two separate chargeable incidents of confinement to analyze under the Richardson test. . . .

. . . .

Acting as Perry's accomplice, Boyd first confined Wilson when Perry ordered Wilson from his car at gunpoint and escorted him toward the apartment building. At that point,

Boyd and Ovanda emerged from the building and trained the gun on Wilson while Perry went to get the car. Once the car arrived, Boyd and Ovanda attempted to shove Wilson first into the trunk and then the back seat of the automobile before Wilson was finally able to fight back and force Boyd and the others to leave the scene in Wilson's car. This evidence shows unequivocally that Wilson was "continuously confined" from the moment that he exited his car at gunpoint until Boyd and the others sped away in his car. Therefore, it does not matter that Boyd's conduct satisfied both elements of the confinement statute during this continuous period, in that he both confined Wilson and attempted to move him from one place to another. There was but one continuous period of confinement, ...

. . . .

BAKER and MATTINGLY-MAY, JJ., concurred.

STEINER v. STATE, No. 47A05-0103-CR-123, ___ N.E.2d ___ (Ind. Ct. App. Mar. 7, 2002).
VAIDIK, J.

On June 24, 2000, the Lawrence County police arrested Steiner for possession of marijuana. Steiner posted a $500 cash bond the next day to secure her release from the Lawrence County Jail. . . . At Steiner's initial hearing held on July 2, 2000, Steiner pled not guilty to the charge, and the trial court ordered that "I'll continue your bond on condition that you have no law violations. A further condition is that you submit to random drug screens at all times told to you by the Lawrence County Intensive Supervision Program." [Citation to Transcript omitted.] The court also ordered Steiner to pay the cost of each drug screen when they were administered.

. . . .

Steiner argues that the trial court erred in imposing drug screens as a condition of her bail because the blanket use of drug tests is not permitted by the statutory provision governing conditions of bail. Because we find Steiner's statutory argument to be dispositive, it is unnecessary for us to address the constitutional challenges against the drug screens that Steiner also raises in her appeal.

. . . While Indiana Code § 35-33-8-3.2 does not specifically provide for the imposition of drug tests as a condition of bail, it does contain an omnibus clause that reads in pertinent part:

> (a) A court may admit a defendant to bail and impose any of the following conditions to assure the *defendant's appearance at any stage of the legal proceedings*, or, upon a *showing of clear and convincing evidence that the defendant poses a risk of physical danger to another person or the community, to assure the public's physical safety*:
>
> . . . .
>
> (8) Impose any other *reasonable restrictions* designed to assure the defendant's presence in court or the physical safety of another person or the community.

[Citation omitted.] . . .

. . . .

Although the general assumption may very well be true that an individual on bail who uses drugs is more likely to fail to appear at another stage of the legal proceedings or to pose a risk of physical danger to another person or the community, we find that the trial court must make an individualized determination that the accused is likely to use drugs while on bail before it is reasonable to place restrictions on the individual based on that contingency. . . .

The record does not reveal that the trial court made any attempt to determine whether the particular facts and circumstances of this case justified the imposition of random drug screens as a condition of bail. Steiner was accused of misdemeanor possession of

marijuana; however, the record reveals no history of substance abuse by Steiner nor any other prior convictions or arrests. While evidence of a history of drug use or of prior drug or alcohol arrests would be a proper basis for imposing drug screens as a condition of bail, no such evidence was introduced that would lead the trial court to make an individualized determination that Steiner would use drugs while she was released pending trial. Therefore, we find that it was not reasonable for the trial court to impose random drug screens as a condition of Steiner's bail . . . . . .

. . . .

FRIEDLANDER, J., concurred.

BARNES, J., filed a separate written opinion in which he dissented, in part , as follows:

I respectfully disagree with the majority's conclusion.

. . . .

Common sense, common experience, and the statute allow the trial court to make a determination that, in a specific case, the danger of a failure to appear by a defendant escalates with the potential use of a controlled substance. [Citation omitted.]

I am unable, given the broad discretion afforded to trial judges in I.C. § 35-33-8-3.2(a), to find that the imposition of this condition in this case with this charge pending is outside the purview of what the statute contemplates.

CIVIL LAW ISSUE

BOLIN v. WINGERT, No. 87S01-0203-CV-177, ___ N.E.2d ___ (Ind. Mar. 11, 2002).

SHEPARD, C. J.

In a case of first impression under Indiana's Child Wrongful Death Statute, we address the question whether an eight- to ten-week-old fetus fits the definition of "child." We conclude that it does not.

While driving on April 13, 1996, Rebecca Bolin stopped her car in the roadway, waiting for the car in front of her to turn. Brandon Wingert struck Bolin's vehicle from behind, and Bolin suffered several injuries, including a miscarriage. . . .

. . . .

[T]he Court of Appeals held that "child" was not expressly defined by the legislature. Bolin v. Wingert, 742 N.E.2d 36, 37 (Ind. Ct. App. 2001). Relying on a 1972 decision, the court held that only "an unborn viable child" had a claim under the Wrongful Death Statute. [Citation omitted.] . . .

. . . .

We first note that appellants cited the wrong version of the Child Wrongful Death Statute to the trial court and Court of Appeals. [Citation to Brief omitted.] At the time of the accident in 1996, Indiana's Child Wrongful Death Statute was found at Indiana Code § 34-1-1-8. This version of the statute reflected major legislative revisions made in 1987 and 1989, including the addition of a definition of "child." [Citation omitted.] [Footnote omitted.] . . .

. . .

> As used in this section, "child" means an unmarried individual without dependents who is:
> (1) less than twenty (20) years of age; or
> (2) less than twenty-three (23) years of age and is enrolled in an institution of higher education or in a vocational school or program.

Id. at § 34-1-1-8(a). . . .

. . . .

We look first to the legislature's basic definition of "child": "an unmarried individual without dependents who is less than twenty (20) years of age." Ind. Code Ann. § 34-1-1-8(a) (West 1996). This definition contains four concepts: an (1) unmarried, (2) individual, (3) without dependents, (4) who is less than twenty years of age.

The first three concepts tend to indicate the legislature contemplated that only living children would fall within the definition of "child." . . . It would strain this rather express language to read "unmarried individual without dependents" to encompass an unborn child. . . .

. . . .

In contrast to the apparent meaning of the express language used in the statute at issue in this case, in other contexts the legislature has enacted protections for unborn

From these statutes, it is apparent that the legislature knows how to protect unborn children. The fact that the legislature did not expressly include unborn children within the definition of "child" in the Child Wrongful Death Statute lends further credence to our conclusion that an eight- to ten-week-old fetus does not meet the statute's definition of "child."

. . . .

. . . The exclusion of unborn children from Indiana's Child Wrongful Death Statute does not mean that negligently injured expectant mothers have no recourse. . . .

. . . .

It is hornbook law that a tortfeasor takes the injured person as he finds her, and the tortfeasor is not relieved from liability merely because an injured party's pre-existing physical condition makes him or her more susceptible to injury. . . .

. . . It is foreseeable that pregnant mothers may be driving on the roadway and that negligent operation of a vehicle may injure these expectant mothers. Rebecca may claim damages to compensate her for her miscarriage.

. . . .

BOEHM, DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

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